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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-467

BUILDING OWNERS & MANAGERS ASSOCIATION OF METROPOLITAN DETROIT, BOOK BUILDING CO., COMFORD INVESTMENT CO., FISHER NEW-CENTER CO., FORT STREET REALTY CO., GUARDIAN BUILDING CORPORATION, WASHINGTON BOULEVARD BUILDINGS, INC., WINEMAN INVESTMENT CO.,

On behalf of themselves and all other users of DETROIT EDISON COMPANY steam heat in the metropolitan Detroit area

CITY OF DETROIT, COUNTY OF WAYNE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Petitioners,

vs.

THE DETROIT EDISON COMPANY and MICHIGAN PUBLIC SERVICE COMMISSION,

Respondents.

REPLY OF RESPONDENT THE DETROIT EDISON COMPANY TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Detroit Edison Company denies that this Court has jurisdiction under 28 USC § 1257 (3) for the reasons set forth *infra*.

QUESTION PRESENTED

The Circuit Court for Ingham County granted Petitioners' motion for partial summary judgment holding that proceedings resulting in an order of the Michigan Public Service Commission allowing an increase in the steam rates charged by Respondent The Detroit Edison Company must be remanded to the Commission for new hearings because *certain of* the petitioners did not have adequate notice of the hearing.[1] The Court reached this decision in the face of Respondent's argument that the matter involved was legislative in character and hence no notice was required.

The question now presented here is whether, on the face of the record *at that point,* the Court was constitutionally required to order a refund of monies collected by Respondent Edison under the challenged rates where the only determination made supports the reasonableness of the rates and the only error claimed was the failure of the Michigan Public Service Commission to give certain of the petitioners adequate notice of the hearing.

COUNTER-STATEMENT OF THE CASE

On May 7, 1970, Respondent The Detroit Edison Company filed an application with Respondent Michigan Public Service Commission seeking to increase rates covering the supply of steam to approximately 1,200 steam custo-

[1] It is undisputed that Petitioner The City of Detroit had notice of the hearing by virtue of a letter sent to it by the Commission under MCLA §460.1. The City elected not to take part in the hearing.

mers in the downtown and midtown Detroit area (Michigan Public Service Commission Case No. U-3678). Among the customers of Detroit Edison affected by the application were the governmental bodies of the City of Detroit, County of Wayne, State of Michigan and United States as well as the Wayne State University and numerous downtown and midtown building owners.

The Commission fixed the initial hearing date of September 1, 1970, and pursuant to its historical practice and custom, mailed its Notice of Hearing dated August 21, 1970, to the City of Detroit, one of the Petitioners herein. The only other Notice of Hearing sent by the Commission was to The Detroit Edison Company.

On August 5, 1970, the attorney for The Detroit Edison Company sent a copy of the application to the Assistant Corporation Counsel for the City of Detroit, and also advised him that the initial hearing date was September 1, 1970. On August 19, 1970, counsel for Edison had delivered to Detroit's Assistant Corporation Counsel a copy of the proposed rate schedules involved.

Hearings on the application were held before the Commission on September 1, 3 and 11, 1970. The City of Detroit did not file an Appearance nor participate in the proceedings. Cadillac Overall Supply Company petitioned for intervention, said petition was consented to by Respondent Edison herein and the Respondent Commission granted the petition. Cadillac participated in the proceedings. Representatives of North American Rockwell Corporation, Revere Copper and Brass Company and Anaconda Brass Company appeared at the hearings and made statements. As Assistant Attorney General of the State of Michigan participated on behalf of the Commission

Staff in these hearings and on its behalf consented to the reasonableness of the rates.

On September 21, 1970, Building Owners & Managers Association of Metropolitan Detroit (BOMA), one of the Petitioners herein, filed its delayed petition for intervention and rehearing and its petition was denied by the Commission that day. Respondent Edison was not notified of Petitioner's request for intervention until the day after it had been filed and denied.

On September 21, 1970, the Commission issued its order authorizing The Detroit Edison Company to increase its steam rates effective on and after September 21, 1970, in the amount requested by The Detroit Edison Company, which was approximately $2.8 million annually.

On October 19, 1970, petitioner, Building Owners & Managers Association of Metropolitan Detroit (BOMA), along with other petitioners herein (six private corporations or partnerships that owned or operated buildings that received steam service from The Detroit Edison Company), commenced an action in the Ingham County Circuit Court appealing from the September 21, 1970, Commission order. In the complaint it was prayed that

> "A. Defendant answer this complaint, answer under oath being expressly waived.
>
> B. An order be entered finding and determining that the aforesaid steam rates are unlawful and unreasonable and that the order be vacated.
>
> C. *An order be entered finding and determining that Defendant's order denying Association's Delayed Petition for Intervention and Rehearing was improper.* (Emphasis supplied.)

D. This honorable court permanently enjoin Defendant from enforcing said order.

E. This honorable court grant Plaintiffs such additional relief as shall be just and equitable."

On November 13, 1970, pursuant to a stipulation between Petitioners herein and Respondent Commission, Respondent The Detroit Edison Company was ordered to be added as a party defendant to the proceedings.

On February 2, 1971, Petitioners filed a Motion for Declaration of Class Action. The Motion was granted by the Court on June 4, 1971.

On February 8, 1971, the City of Detroit filed a Motion for Leave to Intervene as a party plaintiff. Intervention was allowed by the Court on July 8, 1971.

On February 9, 1971, the Board of Governors of Wayne State University filed a Motion for Leave to Intervene as a party plaintiff. Intervention was allowed by the Court on July 8, 1971.

On May 1, 1971, Michigan Attorney General Frank J. Kelley filed a Notice of Intervention as a party plaintiff. Such intervention was opposed by Respondent Edison on the ground that the Attorney General was already representing Respondent Michigan Public Service Commission, the defendant in the Circuit Court and, therefore, was in a direct conflict of interest situation. On July 9, 1971, the Ingham Circuit Court permitted the Attorney General to Intervene as a party plaintiff.

On August 24, 1971, the County of Wayne, Michigan, filed an appearance as a plaintiff in the proceedings.

On September 11, 1971, Respondent Edison filed its Application for Leave to Appeal to the Michigan Court of

Appeals from the Ingham Circuit Court's order permitting intervention as a party plaintiff of the Attorney General. On October 11, 1971, the Court of Appeals denied Respondent Edison's application on the ground it failed to show need for immediate appellate review.

On February 4, 1972, Petitioners herein filed a motion seeking a summary judgment declaring the September 21, 1970, order of the Commission null and void and ordering a full refund and repayment of the steam rate increase collected thereunder.

On April 11, 1973, the Court granted the motion, in part, finding that the Commission had failed to provide certain petitioners with adequate notice of the application and hearing. The Court held that the Commission notice sent solely to the City to Detroit failed to satisfy either the requirements of MCLA 460.6a or of fundamental due process, as guaranteed by the United States and Michigan Constitutions. The Court then remanded the matter to the Michigan Public Service Commission for the purpose of giving adequate notice to individual users of steam heat and for a new hearing on the rates.

On April 26, 1973, Petitioners herein filed a motion for rehearing entitled "Motion for Supplemental Order" requesting that the Court (a) prohibit the collection of any further steam rate increases provided for in the Commission's order of September 21, 1970, and (b) order The Detroit Edison Company to refund all sums collected pursuant to the Commission order.

On July 19, 1973, the Court heard arguments of the parties and subsequently received extensive briefs, including a reply brief and a supplemental brief, from the parties.

On October 23, 1973, petitioners herein filed a Motion for Prompt Decision on their pending Motion for Supplemental Order which was noticed for hearing *by Petitioners* on January 11, 1974. On January 11, 1974, the Court issued its Order Denying the Motion for Supplemental Order but the Court did order respondent Edison to post a $10,000,000 bond in order to insure a refund to petitioners if, on hearing before the Commission regarding the substantive reasonableness of the rates, such refund was found to be proper. On January 28, 1974, respondent Edison filed said bond.

On January 30, 1974, Petitioners herein filed their Claim of Appeal to the Michigan Court of Appeals. On February 14, 1974, Respondent Edison filed its Motion to Dismiss Petitioner's Claim of Appeal. On May 9, 1974, the Court of Appeals dismissed the Claim of Appeal on the ground that the Circuit Court order appealed from did not constitute a final judgment under Michigan law.

On March 6, 1974, Petitioners herein filed their Application for Leave to Appeal to the Michigan Court of Appeals. On April 19, 1974, , the Court of Appeals denied the application on the ground that Petitioners failed to persuade the Court that interlocutory review was necessary.

On or about May 10, 1974 and May 30, 1974 Petitioners herein filed Applications to the Michigan Supreme Court for Leave to Appeal and for Peremptory Order from the aforementioned respective Orders of the Court of Appeals. On July 24, 1974 the applications were denied by the Michigan Supreme Court because Petitioners failed to persuade that court that the questions presented should be reviewed by it.

ARGUMENT

I.

THE COURT LACKS JURISDICTION OF PETITIONERS' APPLICATION UNDER 28 USC § 1257.

Petitioners seek to invoke this Court's jurisdiction under 28 USC § 1257 which provides in pertinent part as follows:

> "§ 1257. State courts; appeal; certiorari
>
> *Final judgments or decrees* rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari. . . ."

However, there has been no final judgment or decree rendered in this case. The Circuit Court for Ingham County in granting Petitioners' motion for partial summary judgment, *remanded* the cause to Respondent Commission for hearings in which those Petitioners who the Court determined had inadequate notice could participate. The Circuit Court clearly retained jurisdiction but expressly ordered that no action be taken as to the issue of the substantive reasonableness of the steam rates until after the new hearing before the Commission pursuant to the remand. (Petitioners' Appendix A-7.) Upon this record, it is clear that there was more to be decided and that there had been no effective determination of the litigation. *Clark* v *Williard*, 292 US 112 (1933); *Market Street Railroad Co* v *Railroad Commission of the State of California*, 324 US 548 (1944), *reh denied*, 324 US 890 (1944). The

requirement of "finality" is not one of those technicalities easily scorned. It is an important factor in the smooth working of our federal system. *Radio Station WOW* v *Johnson,* 326 US 120 (1944).

Nor does this case fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action. *Local No. 438 Construction & General Laborers' Union* v *Curry,* 371 US 542 (1963); *Mills* v *Alabama,* 384 US 214 (1966). Petitioners' claimed right to a refund is inextricably interwoven with the question of whether the challenged rates are reasonable or unreasonable, the precise question which the Circuit Court remanded for new hearings before Respondent Commission. If the rates are found to be reasonable (and there has been no finding to the contrary by any court or administrative tribunal in this case), the refund would operate so as to deprive Respondent Edison of due process in that it would have provided service for which it had not been paid. If the rates are found unreasonable in any particular, petitioners are protected by a bond covering interest as well as the amounts actually paid.

Petitioners' application is premature. The Michigan Court of Appeals expressly noted the lack of finality of the Circuit Court order when it held that Petitioners had failed to persuade it " . . . of the need for immediate appellate review", (Petitioners' Appendix C), and further that the orders " . . . sought to be appealed do not constitute a final judgment", (Petitioners' Appendix D). The Court therefore lacks jurisdiction. To accept this case in its present posture would lead the Court to exercise its jurisdiction in piece-meal proceedings or to render an advisory opinion. *Pope* v *Atlantic Coast Line Railroad Co.,* 345 US 379 (1953.)

II.

THE ORDER ENTERED BY RESPONDENT COMMISSION WAS NOT VOID AND A REMAND FOR NEW HEARINGS WAS PROPER.

Petitioners base much of their argument on the claim that the order entered by Respondent Commission was void because of an inadequacy of notice to the ratepayer Petitioners herein.[2]

Petitioners erroneously rely on *Hanson* v *Denckla,* 357 US 235 (1958) and *McDonald* v *Mabee,* 243 US 90 (1917) which are inapposite because they were cases where there was a complete failure of jurisdiction because of lack of effective service of process. In this case there is no question that the Commission had jurisdiction to conduct the hearings held below. The Circuit Judge expressly so held in his opinion below (Petitioners' Appendix A-1, 2;) and Petitioners' claim no error in this finding. Thus, this case presents the situation where an otherwise valid order is *voidable* at the instance of a party who, as the Circuit Court held, did not receive adequate notice. *Armstrong* v *Manzo,* 380 US 545 (1965) and *Roller* v *Holly,* 176 US 398 (1900), cited by Petitioners, clearly indicate that the orders there involved were *voidable,* not void, at the instance of one who was not afforded adequate notice. As the Court noted in *Toy Toy* v *Hopkins,* 212 US 542 (1908):

> "It is rarely that things are wholly void and without force and effect as to all persons and for

[2] It should be noted that no Michigan Appellate Court has yet passed upon Respondents' contention that the rate making activity herein was basically a legislative function and as such there was no constitutional requirement of notice to customers.

all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed."

In any event, the lower court's disposition of the matter was proper. In *Atlantic Coast Line Railroad Company* v *State of Florida*, 295 US 301 (1934), *reh denied* 295 US 769, this Court was presented with a similar argument that the invalidation of an ICC order for failure to include findings of fact required by law requires the immediate refund of rates collected under that order until the defect was cured. The Court held to the contrary, and remanded as here, noting that the remedy requested was one of restitution and stating:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.
>
> The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it." (295 US at 309-310.)
>
> • • •
>
> "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound dis-

cretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip... "'In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.' " (295 US at 310.)

• • •

"To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings. The blunders being now corrected, the verities of the transaction are revealed as they were from the beginning. We think the better view is that in the light of its present knowledge, the court will stay its hand and leave the parties where it finds them." (295 US at 314)[3] (emphasis supplied.)

Here, the "blunder," if any was the failure of Respondent Commission to give what the Circuit Court deemed to be adequate notice. The lower court devised a remedy to correct that "blunder" and at the same time preserve the rights of Petitioners and Respondent Edison. See *Weidberg* v *American Airlines, Inc.*, 336 F Supp 407 (N.D. Ill. 1972) where the Court likewise refused to order an immediate refund to a class of plaintiffs who had

[3] It is noteworthy that the Court in *Atlantic Coast Line*, determined that the ICC order was in fact voidable although it referred to it in an earlier decision as void. (295 US at 311.)

been given no notice of a rate making proceeding. The Court found the defect to be procedural in nature and curable by a remand, stating:

> "If a determination of unreasonableness is made, coupled with the Moss court's decision holding the C.A.B.'s order and its fares invalid then there is a basis for finding that the retention by the air carriers of the increase of the fares would violate equity and good conscience. The Act implies that fares should be just and reasonable, as well as not discriminatory, prejudicial or preferential. *If the fares are found to be reasonable, on the other hand, then the only equity on plaintiff's side is the procedural defect committed by the C.A.B.* Since the Act allows reasonable fares and it can not be doubted that the carriers are entitled to a reasonable rate of return, plaintiffs would have a weak case if the fares were reasonable and just." (336 F Supp at 407.) (Emphasis supplied.)

Moreover, in the face of plaintiffs' claim that the C.A.B. order was void *ab initio* (as petitioners claim here), the Court found the order to be voidable, relying on this Court's decision in *Atlantic Coast Line, supra.* (336 F Supp at 411.)

The decision of the Ingham Circuit Court was in accord with this Court's decision in *Atlantic Coast Line, supra,* and *Weidberg, supra.* It also was in accord with applicable Michigan law. *Michigan Consolidated Gas Company* v *Michigan Public Service Commission,* 389 Mich 624. (1973.)

Petitioners however claim that their due process rights were infringed and that is the end of it. They say a refund must be declared. This argument ignores that due process must be accorded Respondent Edison as well and such is not accomplished by awarding Petitioners a windfall because of a claim of inadequate notice of the hearing. If the rate is found to be in fact reasonable, Petitioners have paid the proper amount for a service they have already received. A refund now without any determination that the rates set are in any way substantially unreasonable would clearly deprive Respondent Edison of its property. In *Michigan Consolidated Gas Company* v *Michigan Public Service Commission, supra,* the Circuit Court, upon appeal by the utility, ordered a rate increase over and above that authorized by the Public Service Commission pending a remand to the Commission, even though certain commercial and residential utility customers were affected for the first time in the proceedings by the Court order. The Court required the utility to file a bond in case a refund was required after the new Commission hearings. It is submitted that in that case, as in this case that the purpose of the Court should be to effectuate the true "due process" or fundamental fairness requirement as aptly explained by this Honorable Court:

> "Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is com-

pounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." *Joint Anti-Fascist Refugee Committee* v *McGrath*, 341 US 123. (1951).

III.

THE REMAND DOES NOT WRONGFULLY SHIFT THE BURDEN OF PROOF.

Petitioners, relying on *Armstrong* v *Manzo, supra,* claim that the Circuit Court, in its order to remand, has wrongfully shifted the burden of proof to Petitioners. The record does not bear out this contention. In its order dated January 11, 1974, the Court stated as follows:

> "This Court's Opinion, rendered April 11, 1973, made no determination as to whether the steam rates granted to Detroit Edison by the Michigan Public Service Commission on September 21, 1970, were unreasonable or confiscatory. The only determination made was that proper notice of the application to increase steam rates must be given to those customers of Detroit Edison. The remand to the Public Service Commission was for the purpose of giving the notice required and then having a subsequent hearing as to whether the rates granted in 1970 were excessive or not taking into consideration any evidence that existed at the time of the original rate hearings which any in-

terest party may wish to submit." (Petitioners' Appendix B1, 2.)

The Order clearly envisages a new and complete hearing at which *all parties* must submit evidence, including this Respondent. The order clearly does not shift the burden of proof as claimed. This respondent certainly intends to present evidence through witnesses and to have those witnesses cross examined by those parties who choose to exercise the right.

CONCLUSION

Respondent The Detroit Edison Company prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FISCHER, FRANKLIN & FORD
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The Detroit Edison Company
By: /s/ Richard Ford
/s/ George Hogg, Jr.
/s/ Francis E. Bentley